

Oct 11, 2017

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

EMPIRE HEALTH FOUNDATION, a  
Washington nonprofit corporation,

No. 2:17-cv-00209-SMJ

Plaintiff,

v.

**ORDER DENYING IN PART AND  
GRANTING IN PART  
DEFENDANTS' MOTION TO  
DISMISS**

CHS/COMMUNITY HEALTH  
SYSTEMS, INC, a Delaware  
corporation; CHS WASHINGTON  
HOLDINGS, LLC, a Delaware limited  
liability company; SPOKANE  
WASHINGTON HOSPITAL  
COMPANY, LLC, a Delaware limited  
liability company; and SPOKANE  
VALLEY WASHINGTON HOSPITAL  
COMPANY, LLC, a Delaware limited  
liability company,

Defendants.

I. INTRODUCTION

This case arises from the sale of two hospitals in Spokane in 2008. Empire Health Foundation (the Foundation) alleges that the defendants (collectively CHS) have breached the hospital Asset Purchase Agreement (the contract) by failing to provide sufficient charity care and by failing to meet several other

1 community-health and capital-expenditure obligations. CHS moves to dismiss,  
2 arguing that (1) the charity-care requirement the Foundation seeks to enforce is  
3 not a part of the contract and not enforceable under the contract; (2) the  
4 Foundation fails to allege facts supporting any other breach of contract claim; (3)  
5 the Foundation fails to allege cognizable injury; and (4) the Foundation’s claims  
6 are barred by the statute of limitations.<sup>1</sup> The charity-care requirement at issue here  
7 is not directly included in the contract, and, in fact, it is inconsistent with the  
8 contract’s charity-care provision. However, because the contract’s charity-care  
9 provision is “subject in all respects to changes in legal requirements or  
10 governmental guidelines or policies,” the requirement the Foundation seeks to  
11 enforce, which is included in a Certificate of Need (CON) issued by the  
12 Washington Department of Health (DOH), is enforceable under the contract. With  
13 respect to CHS’s remaining arguments, the Foundation has alleged a cognizable  
14 injury; the Foundation fails to state a claim for breach of any other contractual  
15 provision; and the Foundation’s claims are not time barred.

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18 <sup>1</sup> CHS also moves to dismiss all claims against Defendant CHS Washington  
19 Holdings, LLC because it is not a party to the contract at issue and the foundation  
20 does not make any specific allegations against it in the complaint. ECF No. 13 at 1.  
The Foundation has not responded to this argument. CHS’s characterization of the  
allegations appears correct. Accordingly all claims against Defendant CHS  
Washington Holdings, LLC are dismissed for failure to state a claim

## II. BACKGROUND

In 2008 Empire Health Systems (Empire) sold Deaconess Medical Center and Valley Hospital and Medical Center (the Hospitals) to Defendant Spokane Washington Hospital Company, LLC (SWHC) pursuant to an Asset Purchase Agreement (the contract). ECF No. 1 at 1–2, 8; ECF No. 14-1. SWHC is owned and controlled by CHS/Community Health Systems, Inc. (CHS)<sup>2</sup> which guaranteed all of SWHC's obligations under the Contract. ECF No. 1 at 2, 8. The Foundation is a non-profit community health foundation formed from the proceeds of the hospital sale. ECF No. 1 at 1. The Foundation was assigned all of Empire's rights and obligations when dissolved following the sale. ECF No. 1 at 1.

12 The Foundation alleges that when CHS purchased the Hospitals it agreed  
13 to provide charity care and essential health services as required under  
14 Washington's Charity Care Act and Certificate of Need laws. ECF No. 1 at 3.  
15 The Foundation alleges the CHS was obligated to provide charity-care to  
16 indigent patients at a level that meets or exceeds the regional average, screen  
17 patients for indigency before demanding payment, provide care through  
18 community-based health programs designed to serve elderly, poor, and at-risk

<sup>20</sup> The Foundation alleges the remaining named defendants are involved in operating the Hospitals and are wholly owned and controlled by CHS. ECF No. 1 at 2.

1 populations, and to fund at least \$100,000,000 in capital expenditures at the  
2 Hospitals. ECF No. 1 at 3, 8–9.

3 The Contract addresses “Indigent Care Policies” as follows:<sup>3</sup>

4 As of the Closing Date Buyers shall adopt the indigent care  
5 policies of CHS attached as Exhibit D hereto, including the  
6 relevant provisions of the billing and collections policy with  
7 respect to the indigent which are at least as favorable to the  
8 indigent and uninsured as Seller’s indigent care policy, including  
9 the relevant provisions of the billing and collections policy with  
10 respect to the indigent, for the Hospitals as Buyers’ indigent care  
11 policy. No patient will be turned away because of age race gender  
12 or inability to pay. Buyers shall use best efforts to cause the  
13 Hospitals to continue to provide services to patients covered by  
14 the Medicare and Medicaid programs and those unable to pay for  
15 emergent or medically necessary care at levels similar to the  
16 historic levels of indigent care previously provided by the  
17 Hospitals. For a period of at least ten (10) years following the  
18 Closing Date Buyers will provide the Board of Trustees with an  
19 annual report of their compliance with this Section 10.14. Buyers  
20 will also continue to provide care through community-based health  
programs, including cooperation with local organizations that  
sponsor healthcare initiatives to address identified community  
needs and improve the health status of the elderly, poor, and at-  
risk populations in the community. This covenant shall be subject  
in all respects to changes in legal requirements or governmental  
guidelines or policies (such as implementation of universal  
healthcare coverage).

16 Contract § 10.15, ECF 14-1 at 53–54. The indigent care policy provides that  
17 “[i]n order to serve the health care needs of our community, and in accordance  
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19 <sup>3</sup> The Court may consider the language of the contract on this Rule 12(b)(6) motion  
20 because the contract is referred to extensively in the complaint and forms the basis  
of Empire’s claims. *See United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir.  
2003).

1 with RCW 70.170 and WAC 246-453, Deaconess Medical Center ('Hospital')  
2 will provide "Charity Care" to patients or the "Responsible Party" without  
3 financial means to pay for 'Appropriate hospital-based medical services.'"  
4 ECF No. 14-2 at 14. The policy defines eligibility and processes for  
5 identification of charity cases, provision of charity care, and denial of charity  
6 care. ECF No 14-2 at 14–19.

7 Pursuant to the Contract, CHS applied for and obtained a "Certificate of  
8 Need" from the Department of Health. ECF No. 18-1 at 2. The Certificate  
9 provided that:

10 Deaconess Medical Center will provide charity care in compliance  
11 with the charity care policies provided in this Certificate of Need  
12 application, or any subsequent policies reviewed and approved by  
13 the Department of Health. Deaconess Medical Center will use  
14 reasonable efforts to provide charity care in an amount comparable  
15 to or exceeding the average amount of charity care provided by  
hospitals in the Eastern Washington Region. Currently, this  
amount is 3.35% of the adjusted revenue. Deaconess Medical  
Center will maintain records documenting the amount of charity  
care it provides and demonstrating its compliance with its charity  
care policies.

16 ECF No. 18-1 at 2–3.

17 The Foundation alleges that CHS has failed to meet its charity  
18 requirements. ECF No. 1 at 3. Specifically, the Foundation alleges that the  
19 CHS fell more than \$55 million below the regional charity-care average  
20 between 2008 and 2015. ECF No. 1 at 4. The Foundation further alleges that

1 the Hospitals have inflated their charity-care numbers by charging inflated  
2 rates to self-pay patients. ECF No. 1 at 4–5. The Foundation points out that the  
3 Hospitals’ total charges per patient day for self-pay patients (known as the  
4 “chargemaster”) has increased at rates significantly higher than the average for  
5 Eastern Washington Region hospitals. ECF No. 1 at 5. Considering this  
6 alleged chargemaster inflation, the Foundation alleges that CHS fell more than  
7 \$110 million below the regional charity-care average between 2008 and 2016.  
8 ECF No. 1 at 5–6, 9.

9       The Foundation also alleges that CHS has implemented policies and  
10 practices designed to drive indigent patients away from the Hospitals and to  
11 overcharge them when they do seek care, failed to provide sufficient care  
12 through community-based health programs, and failed to meet its obligation to  
13 fund capital expenditures. ECF No. 1 at 7, 9.

14       The Foundation alleges that CHS’s actions have (1) breached the  
15 agreements associated with the hospital purchase and (2) constitute a breach of  
16 the implied duty of good faith and fair dealing. ECF No. 1 at 7, 9–10. The  
17 Foundation seeks injunctive relief requiring the Defendants to comply with the  
18 its charity-care obligations under the contract and Washington law and  
19 disgorgement of all excess profits retained as a result of its failure to comply  
20 with those obligations. ECF No. 1 at 8, 10.

### **III. LEGAL STANDARD**

A claim may be dismissed pursuant to Rule 12(b)(6) either for lack of a cognizable legal theory or failure to allege sufficient facts to support a cognizable legal theory. *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

## IV. DISCUSSION

A. The Foundation has alleged a breach of contract claim based on failure to provide adequate charity care.

The Foundation acknowledges that its breach of contract claim does not attempt to enforce the contract's express charity-care requirements, which required CHS to use "best efforts" to provide indigent care "at levels similar to the historic

1 levels.” Instead, the Foundation alleges that CHS breached its obligation under the  
2 CON and under statute to “make reasonable efforts to provide charity care in an  
3 amount comparable to or exceeding” the regional average. Accordingly, the critical  
4 question for the purpose of this motion is whether the CON’s charity-care obligation  
5 is incorporated into the contract and may be enforced in a breach of contract action.  
6 The Foundation asserts that the CON’s charity-care requirement is incorporated into  
7 the contract in three ways: (1) Through section 4.3 of the contract, which provides  
8 that “all agreements to which any of the Buyers or CHS will become a party  
9 pursuant hereto will constitute the valid and legally binding obligations of [CHS]”;  
10 (2) through incorporation of background state law; and (3) through Section 10.14  
11 of the contract, which sets specific minimum charity-care requirements, but also  
12 provides that “[t]his covenant shall be subject in all respects to changes in legal  
13 requirements or governmental guidelines or policies such as implementation of  
14 universal health coverage.” For the reasons discussed, the CON’s charity care  
15 requirement is not enforceable through section 4.3 or incorporated under  
16 background law, but it is enforceable under section 10.14.

17       **1. The CON’s charity-care requirement is not enforceable under**  
18       **section 4.3 of the contract.**

19       Section 4.3 provides that “[t]his agreement and all agreements to which any  
20 of the Buyers or CHS will become a party pursuant hereto will constitute the valid  
and legally binding obligations of [CHS].” ECF no. 14-1 at 37. The Foundation

1 argues that the CON was an “agreement” entered into between CHS and the  
2 Department of Health pursuant to the government approvals provisions of the  
3 contract (sections 5.4, 6.1, 7.2(a)-(b), & 8.2), and it is therefore enforceable under  
4 section 4.3. ECF No. 17 at 7. While the CON may be an “agreement” under the  
5 dictionary definition of that term (in that DOH proposed certain conditions and CHS  
6 accepted them), it is plainly not the type of agreement contemplated by section 4.3.  
7 Rather, and as the Foundation suggests, it is a “government approval” required to  
8 facilitate the transaction as discussed in sections 5.4, 6.1, 7.2, and 8.2. ECF No. 14-  
9 1 at 40–41, 43, 45. There is no indication that the parties intended that section 4.3  
10 would make government approvals enforceable under the contract. It is clear to the  
11 Court that the parties intended section 4.3 to apply to contractual obligations such  
12 as private contracts, leases, and similar agreements, as discussed in section 1.5.

13       **2. A heightened charity-care requirement is not incorporated as**  
14       **background law.**

15       The Foundation argues that because contracts are presumed to incorporate  
16 settled law, CHS was obligated to comply with the requirements of Washington’s  
17 Charity Care Act. ECF No. 17 at 8. It is true as a general matter that the relevant  
18 law existing at the time of formation becomes part of a contract. *See Cornish Coll.*  
19       *Of the Arts v. 1000 Va. Ltd. P’ship*, 242 P.3d 1, 12 (Wash. App. 2010) (“one of  
20 the basic principles of contract law is that the general law in force at the time of

1 the formation of the contract is a part thereof.”). The Foundation’s argument  
2 nevertheless fails for two independent reasons.

3 First, the Foundation incorrectly states that Washington Revised Code  
4 (RCW) 70.38.115(2)(j) and 70.170.060 mandate that CHS provide charity care at  
5 a level meeting or exceeding the regional average. ECF No. 17 at 10. That is  
6 simply not the case. RCW 70.38.115(2)(j) provides that whether a “hospital meets  
7 or exceeds the regional average level of charity care” is a factor DOH must  
8 consider in reviewing a CON application. Similarly, RCW 70.170.060 does not  
9 set any specific minimum level of charity care.

10 Second, the parties agreed to a specific minimum level of charity care in  
11 section 10.14 of the contract. Statutory requirements do not override permissible  
12 provisions explicitly agreed to by the parties. *See State v. Farmers Union Grain*  
13 *Co.*, 908 P.2d 386, 389 (Wash. App. 1996) (statutory procedure for distribution of  
14 a condemnation award did not prohibit contract’s different condemnation  
15 procedure); ECF No. 13 at 7; ECF No. 19 at 2. Here, the parties expressly agreed  
16 to a specific minimum level of charity care in section 10.14. ECF No. 14-1 at 53.  
17 That specific provision overrides any background law that would have  
18 otherwise been applicable.

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1           **3. The CON's charity-care requirement is enforceable under**  
2           **section 10.14.**

3           Section 10.14 provides, among other things, that "Buyers shall use best  
4           efforts to cause the Hospitals to continue to provide services to patients covered by  
5           the Medicare and Medicaid programs and those unable to pay for emergent or  
6           medically necessary care at levels similar to the historic levels of indigent care  
7           previously provided by the Hospitals." ECF No. 10-14 at 53. This is in conflict with  
8           the CON's requirement that the Hospitals "use reasonable efforts to provide  
9           charity care in an amount comparable to or exceeding the average amount of  
10          charity care provided by hospitals in the Eastern Washington Region." ECF No.  
11          18-1 at 2–3. However, section 10.14 also provides that "[t]his covenant shall be  
12          subject in all respects to changes in legal requirements or governmental guidelines  
13          or policies (such as implementation of universal healthcare coverage)." ECF No.  
14          14-1 at 54.

15          CHS argues that this provision is merely a limitation on the charity-care  
16          requirement, and that it can operate only to eliminate the requirement if it becomes  
17          unnecessary. ECF No. 19 at 7–8. CHS argues that this interpretation is supported  
18          by the example—implementation of universal healthcare—which may largely  
19          eliminate the need for charity-care. *Id.*

20          The provision's meaning is not as limited as CHS would like. The term  
21          "subject" used in this context means "[d]ependent on or exposed to (some

1 contingency)." *Subject*, Black's Law Dictionary (10th ed. 2014). Read with the  
2 remainder of the sentence—"in all respects to changes in legal requirements or  
3 governmental guidelines or policies"—it is clear that this is intended to keep the  
4 contract's charity-care requirements consistent with changed legal requirements or  
5 government guidelines or policies. In other words, section 10.14 requires CHS to  
6 meet certain minimum charity-care obligations, including providing charity-care at  
7 levels similar to historic levels, unless those requirements become inconsistent with  
8 new law or government policy, in which case CHS must comply with the applicable  
9 law or policy. If a universal healthcare law eliminated the need for most charity  
10 care, this provision would relieve CHS of its obligation to provide charity care at  
11 historic levels. But the provision applies equally if new legal requirements or policy  
12 mandate that CHS provide a different minimum level charity care, which is what  
13 happened here. Because section 10.14 requires CHS to comply with changed legal  
14 requirements or policies that are inconsistent with section 10.14's express  
15 requirements, those legal requirements or policies are enforceable under the  
16 contract.

17       The CON changed the required minimum amount of charity care CHS was  
18 obligated to provide. As discussed, the background state law did not set a specific  
19 minimum level of charity care, the parties negotiated and agreed to historic levels  
20 of charity care as the minimum in section 10.14, and the CON changed that

1 minimum to the regional average.<sup>4</sup> Because the CON's charity-care requirement is  
2 a change in applicable legal requirements it is enforceable under the contract.

3 **B. The Foundation fails to state a claim that CHS breached other contract  
4 requirements.**

5 The Foundation alleges that CHS "may have" violated the contract by failing  
6 to meet the following obligations: (1) providing "care through community-based  
7 health programs to address identified community needs and improve the health  
8 status of the elderly, poor and at-risk populations," (2) "the continuation of essential  
9 health services," and (3) "the provision of \$100,000,000 in capital expenditures at  
10 the Hospitals." ECF No. 1 at 7–8. These allegations are insufficient to state a claim  
11 because even accepted as true they do not permit the court to infer more than a mere  
12 possibility of misconduct. *Iqbal*, 556 U.S. at 679. Further, even if the claims were  
13 more forcefully stated, they are not supported by any factual allegations.  
14 Accordingly, these claims are dismissed

15 **D. The Foundation has adequately alleged damages.**

16 CHS argues that The Foundation has failed to adequately plead damages,  
17 which is a necessary element of breach of contract. ECF No. 13 at 17. The  
18 Foundation has more than adequately pleaded damages, including that CHS's  
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20 <sup>4</sup> This change is not on its face a requirement to provide more charity care. It could  
certainly be the case that at some point the regional charity-care average will be less  
than the level historically provided by the hospitals.

1 shortfall in providing charity care directly placed greater demands on the  
2 Foundation's resources for its own mission of improving access to health care. ECF  
3 No. 17 at 13. CHS also argues that disgorgement is not an appropriate remedy for  
4 breach of contract. ECF No. 13 at 18. But CHS cites only case law from other  
5 jurisdictions to support this point and ignores comments *a* and *d* to the Restatement,  
6 which recognize disgorgement as an appropriate contract remedy to prevent unjust  
7 enrichment. Restatement (Second) of Contracts § 344 (1981). Whether  
8 disgorgement is an appropriate remedy here is a factual question that cannot be  
9 decided at this stage.

10 **C. The Foundation's claims are not time-barred.**

11 CHS argues that the six-year statute of limitations for breach of contract and  
12 three-year period for breach of good faith have run. ECF No. 13 at 18–19. RCW  
13 4.16.040. While CHS is correct that under Washington law the statute of limitations  
14 for a continuing breach of contract begins at the initial breach, *see Schreiner Farms,*  
15 *Inc. v. Am. Tower, Inc.*, 293 P.3d 407, 411 (Wash. App. 2013), the allegations here  
16 are of repeated, separate breaches based on data reported each year. Accordingly,  
17 the claims based upon conduct occurring within the limitations period are not  
18 barred.

19 **VI. CONCLUSION**

20 For the reasons discussed, **IT IS HEREBY ORDERED:**

**1. Defendants' Motion to Dismiss, ECF No. 13, is DENIED IN PART AND GRANTED IN PART.**

A. All claims against defendant CHS Washington Holdings, LLC, are **DISMISSED**.

**B.** Defendants' motion is **DENIED** with respect to the Foundation's claims based on CHS's alleged failure to provide the required minimum level of charity-care. Those claims survive.

C. Defendants' motion is **GRANTED** with respect to the Foundation's breach of contract claims based on the allegations in paragraph 19 of the complaint.

**IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and provide copies to all counsel.

**DATED** this 11th day of October 2017.

Salvador Mendoza Jr.  
SALVADOR MENDEZA, JR.  
United States District Judge